IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

U.S. Patent Number	:	7,598,365	Issue Date:	October 6, 2009
Application Number	:	10/580,076	Confirmation No.:	4917
Applicant	:	Kathleen D'HALLUIN, *et al.*		
Filed		May 18, 2006		
Title	:	IMPROVED TARGETED DNA INSERTION IN PLANTS		
TC/Art Unit	:	1638		
Examiner:	:	Cathy Kingdon WORLEY		
Docket No.	:	58764.000062		
Customer No.	:	21967		

MAIL STOP PATENT TERM EXT.
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)

Dear Sir:

Responsive to the Petition Decision mailed August 31, 2009, Applicants submit a Request for Reconsideration of the Patent Term Adjustment under 37 C.F.R. § 1.705(d) of 232 days indicated for the above-identified patent. It is respectfully requested that Applicants be granted a minimum patent term adjustment of **373 days**.

U.S. Patent No. 7,598,365 ("the '365 patent") issued less than two-months from the date of this Request. Accordingly, as required by 37 C.F.R. § 1.705(d), this request is timely.

In accordance with 37 C.F.R. § 1.705(b)(1), please charge the fee set forth in 37 C.F.R. § 1.18(e) ($200) to the undersigned's **Deposit Account No. 50-0206**. In the event any additional fees are required for consideration of this request, the USPTO is authorized to charge these fees to the undersigned's Deposit Account No. 50-0206.

Remarks begin on page 2.

REMARKS

Applicants request reconsideration under 37 C.F.R. § 1.705(d) of the patent term adjustment for the '365 patent. In view of the following, it is respectfully requested that Applicants be granted a minimum patent term adjustment of at least **373 days**.

Statement Under 37 C.F.R. § 1.705(b)(2)

The patent term adjustment ("PTA") under 35 U.S.C. § 154(b) listed on the face of the '365 patent is 232 days. *See* **Exhibit A** (first page of the '365 patent) This determination is in error because the USPTO failed to take certain action within the time frame specified in 37 C.F.R. § 1.702(a) and failed to issue a patent within three years of the actual filing date of the above-identified patent in accordance with 37 C.F.R. § 1.702(b). *See Wyeth v. Dudas* 88 USPQ2d 1538 (D.D.C. 2008).

A. *Wyeth v. Dudas*

In *Wyeth v. Dudas*,[1] the U.S. District Court for the District of Columbia considered the USPTO's interpretation of 35 U.S.C. § 154(b). This section provides three guarantees of patent term adjustment, two of which are at issue. The first is a one-day extension of patent term for every day that issuance is delayed due to the USPTO failure to comply with certain statutory deadlines such as fourteen months for a first office action. *See* 35 U.S.C. § 154(b)(1)(A)(i)-(iv); *see also* 37 C.F.R. § 1.702(a). These delays are called "A delays" or "A periods." The second adjustment is a one-day term extension for every day it takes the patent to issue after three years from the filing date. *See* 35 U.S.C. § 154(b)(1)(B); *see also* 37 C.F.R. § 1.702(b). The period that begins after the three-year window has closed is referred to as the "B delay" or the "B period."

Under the statute, if "A delays" and "B delays" overlap, "the period of adjustment granted … shall not exceed the actual number of days the issuance of the patent was delayed." 35 U.S.C. § 154(b)(2)(A) The purpose of this section is to prevent "double-counting" of periods of delay. *See Wyeth*, 88 USPQ2d at 1539. According to the USPTO's interpretation of this section, any "A delay" overlaps with any "B delay," and thus an applicant can only get credit for an "A delay" *or* a "B delay," whichever is larger, but never for both. *Id.* at 1540. The court disagreed. It concluded that periods of time "overlap" *only* if they occur on the same day. *Id.* at 1541. Therefore, if an "A delay" and a "B delay" occurs on a different day, then a patentee may obtain an extension of A + B days. *Id.*

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[1] This case is now on appeal as *Wyeth v. Kappos*.

B.   Calculation of PTA Under 37 C.F.R. § 1.703 Under *Wyeth*

The following facts are relevant for determining PTA for the '365 patent.

- May 18, 2006 — U.S. Patent Application No. 10/580,076 is filed.
- May 18, 2009 — three years from filing date of application (*i.e.*, beginning of "B period").
- October 6, 2009 – U.S. Patent No. 7,598,365 issues (*i.e.*, end of "B period").

1.   "A" Periods Under 37 C.F.R. § 1.702(a)

The USPTO's delay from May 18, 2006 to May 18, 2009—i.e., prior to the "B period"—is 263 days. *See* USPTO Patent Term Adjustment History, attached herewith as **Exhibit B**.

2.   "B" Periods Under 37 C.F.R. § 1.702(b)

The number of days from the beginning of the "B period" (May 18, 2009, *i.e.*, three years from the filing day of the application) to the end of the proposed "B period" (October 6, 2009, *i.e.*, the day the '365 patent issued) is 141 days.

3.   Delay Attributed to Applicant

The USPTO has calculated Applicants' delay in this case as 31 days. *See* USPTO Patent Term Adjustment History.

4.   PTA = (A Period +B Period) – Applicants Delay

According to *Wyeth*, the PTA should be calculated as follows:

A period = 263 days. *See* 1. above

B period = 141 days. *See* 2. above.

Applicants' delay = 31 days. *See* 3 above.

(263 + 141) – 31 = 373 days

Accordingly, Applicants respectfully request that the '365 patent be granted a minimum PTA of at least **373 days**.

In view of the above remarks, it is respectfully requested that this Request for Reconsideration of Patent Term Adjustment be favorably considered and that a corrected Determination of Patent Term Adjustment be issued to reflect a minimum patent term adjustment of at least **373 days**.

Respectfully submitted,

HUNTON & WILLIAMS LLP

Date: December 4, 2009   By: _____

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